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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 328

MOORE-McCORMACK LINES, INC.,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for Writ of Certiorari:	
Introductory	1
Opinions Below	2
Jurisdiction	2
Question Presented	2
Summary Statement of the Matter Involved	2
Grounds on which the Decision of the Court Below Rested	5
Reasons Relied on for the Allowance of the Writ	6
Brief in Support of Petition:	
Opinions Below	11
Jurisdiction	11
Statement of Facts	12
Specification of Errors	12
Summary of Argument	12
Argument	13
Conclusion	17

Citations

United States v. *Sherebeck*, 17 Fed. Cases, page 1063, Case No. 16275	13
Robertson v. *Downing*, 127 U. S. 607	14
Logan v. *Davis*, 233 U. S. 613, 627	14
Swendig v. *Washington Co.*, 265 U. S. 322	14
Brewster v. *Gage*, 280 U. S. 327	14
Chew Heong v. *United States*, 112 U. S. 536	15
Cook v. *United States*, 288 U. S. 102	15

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THE UNITED STATES,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Moore-McCormack Lines, Inc., respectfully prays that a writ of certiorari issue to review an order and judgment of the Court of Claims of the United States which was entered April 3rd, 1951, in so far as that court failed to grant judgment for payment for the carriage of Brazilian mail subsequent to June 3, 1941, in the sum of $32,043.43. (This sum is conceded by the respondent to be correct in amount if the petitioner is entitled to recover for this period. It has also been conceded and adjudged that the petitioner shall recover $43,198.56 for the carriage of Brazilian mail prior to June 3, 1941.)

Opinion Below

The opinion of the Court of Claims of the United States delivered by Whitaker, Judge, was filed on April 3, 1951, and has not yet been reported but is set forth in the Transcript of Record. The opinion of the Court of Claims upon the determination of the motion for a new trial (per Whitaker, Judge) was filed July 9, 1951 and has not yet been reported but also is set forth in the Transcript of Record.

Jurisdiction

The judgment of the Court of Claims of the United States sought to be reviewed was entered April 3, 1951. Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1255.

Question Presented

The legal question presented involves the effect of a "decree" of the United States of Brazil (Brazilian Decree No. 3326, dated June 3, 1941) upon the undertaking of the United States under the Postal Convention of the Americas (ratified August 12, 1937, approved by the President of the United States, August 20, 1937, *and invoked by Brazil*) to carry Brazilian mail between Brazilian ports and ports of the United States by the same ships which the United States utilized for the carriage of its mail to Brazilian ports.

Summary Statement of the Matters Involved

This is an action brought by the petitioner against The United States for the recovery of money earned by the carriage of mail.

This petition is limited to the review of the question of the petitioner's right of recovery from the United States for the carriage of Brazilian mail after Brazilian Decree

of June 3, 1941. The Court below has denied that right, although it has found judgment for the petitioner for the period before that "decree".

The facts giving rise to the issue are as follows:

In 1939, the petitioner took over the operation of the SSs. Brazil, Argentina and Uruguay. It then began to carry United States mail from ports of the United States to Brazilian ports and it also began to carry Brazilian mail between certain Brazilian ports and between Brazilian ports and ports of the United States. It continued to carry such mail until the vessels were requisitioned in World War II by the United States. The United States paid the petitioner for the mail carried from United States ports to ports in Brazil but it declined to pay for the carriage of any Brazilian mail and this action was instituted. During the course of the trial the United States conceded that the petitioner was entitled to recover for Brazilian mails carried before the "decree" of June 3, 1941, ($43,198.56). That left the sole issue to be whether the "decree" of June 3, 1941 barred the petitioner from recovery for such carriage after that date (the amount involved conceded to be $32,043.43).

The pertinent part of the Postal Convention under which the United States of America bound itself to carry Brazilian mail is as follows:

"ARTICLE 3

FREE AND GRATUITOUS TRANSIT

"1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories, and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter send to any destination.

"2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches."

In its defense the United States introduced a "decree" (Brazilian Decree No. 3.326 of June 3, 1941) offering the Portuguese text and what was represented as an accurate English translation. The pertinent part of *that* English translation is as follows:

"Article 2. It shall be obligatory for all fluvial, lacustrine and maritime carriers or companies of navigation and for Federal, State or Municipal railroads, to transport postal despatches and articles of correspondence gratuitously without limitation on weight or volume.

"Section 1. The transportation shall also be obligatory and gratuitous on railroads, navigation or public highway companies or carriers enjoying especial treatment, benefits or favors from the Union, the States and Municipalities.

"Section 2. In case of vessels the net tonnage of which is equal to, or less than ten tons, the weight of despatches to be transported shall not exceed 4% of such capacity."

The Court below construed the Brazilian "decree" as a bar to recovery of payment for mail carried after June 3, 1941.

The plaintiff relied upon the government's translation but after the decision of the Court below, the petitioner and its attorneys learned for the first time that the government's translation was erroneous. Thereupon, a motion was made for a new trial among other things upon the newly discovered authoritative translation by a duly accredited Brazilian Sworn Translator of the same part of said Decree. That translation reads as follows:

"Article 2. It shall be be obligatory for all Federal, State and Municipal enterprises or companies engaged

in river, lake and maritime navigation, or in the operation of railroads, to tranport postal despatches and articles of correspondence gratuitously, without limitation of weight or volume.

"Paragraph 1. The transportation shall likewise be obligatory and gratuitous as regards railroads and companies or enterprises engaged in navigation or highway traffic which enjoy special treatment, benefits or favors from the Union, the States or the Municipalities.

"Paragraph 2. In case of vessels the net displacement of which is equal to, or less than ten tons, the weight of despatches to be transported shall not exceed 4% of such capacity."

The decision of the Court below rests substantially upon the government's translation of the "decree" involved and the Court's construction of that translation without regard to the interpretation of the "decree" by the Brazilian Post Office Department and to the rule that a treaty will not be deemed to have been abrogated nor modified by a later statute unless such purpose has been clearly expressed.

Ground on Which the Decision of the Court Below Rested

The decision of the Court below is based upon what we believe is an erroneous translation. It has worked a great injustice not only in the instant case but *for all United States* ship mail carriers similarly situated. Judge Whitaker's opinion undertakes to construe that translation without reference to any of the principles of law urged. The following is the crux of his opinion:

> "Article I of the decree sets forth those means of transportation by which the mails of Brazil are authorized to be carried. Among them are 'steamships or packets belonging to foreign carriers, whether subsidized or not, sailing regularly between ports of Brazil and those of foreign countries'. After having so pro-

vided, the decree in Article 2 provides that 'it shall be obligatory for all fluvial, lacustrine and maritime carriers or companies of navigation and for Federal, State or Municipal railroads, to transport postal despatches and articles of correspondence gratuitously, without limitation on weight or volume'.

"Having first set out the various means for the carriage of mails, including people such as plaintiff, that is, 'Steamships or packets belonging to foreign carriers' etc. the decree then says that it shall be obligatory on all these means to transport the mails gratuitously.

"The quotation is from the English translation of the decree. The English word 'all' is a translation of the Portuguese word 'todas'. The literal translation of this word is 'each and every'. The decree, therefore, says that each and every one of the 'fluvial, lacustrine and maritime carriers' are obligated to carry the mails gratuitously. This means, of course, each and every one of those 'fluvial, lascustrine and maritime carriers' mentioned in the preceding article."

Furthermore, the determination is not in accord with United States law as shown in the reasons relied on for Allowance of Writ.

Reasons Relied On for Allowance of Writ

1. The decision below establishes a determination under which not only the petitioner but other United States ship carriers, carrying United States mail to Brazil must carry Brazilian mail to the United States on the same vessels *without compensation.* The Carrier ship can recover payment neither from the United States nor from Brazil. The decision affects not only the *past* but also the future.

2. The Court below overlooked and failed to apply the rule of the Federal Courts that in the absence of any judicial decision determining the construction of a foreign statute, the practical interpretation given it by those whose duty

it has been to apply and administer it affords the best means of ascertaining its true construction. In the present instance the Postmaster General of Brazil has advised the Postmaster General of the United States that the advantages granted the petitioner did not require the transportation of mail gratuitously.

3. The Court below overlooked and failed to apply the rule of law that the provisions of a treaty (in the instant case the Postal Convention) have greater legal force than any internal or local statute unless it abrogates the treaty. In the instant case the Convention has not been abrogated by any Brazilian or United States statute.

4. The Court below has stated that its conclusion "is fortified somewhat by the fact that not until it put in its proof in this case in 1946, did plaintiff present any detailed claim to the United States Post Office for the carriage of Brazilian mails from 1941 on. Such long delay indicates that plaintiff was under the impression that the United States was not liable therefor." This is not supported by anything in the record. The fact is that the plaintiff had wrestled many years from 1942 on with the United States Post Office Department to secure payment.

5. The Court below mistakenly and erroneously supports its conclusion by the statement that the obligation cast upon the plaintiff by this decree was not without consideration, that the so-called packet privileges granted to the plaintiff and accepted by it, obligated the plaintiff to carry Brazilian mails gratuitously.

The so-called "packet" law remained exactly the same after the Decree of June 3, 1941, was passed as before. Before that date the government has conceded the plaintiff should recover but after that date the contract of the plaintiff remained exactly the same. Packet privileges obligated the vessel to comply with the Stamp Tax, the sanitary

rules of the Health Department to transport free of charge one cubic meter of material sent by the Health Department, but never to transport mail free of charge for the Brazilian Government (Tr. Plaintiff's Exhibit No. 42). Simply yet accurately: Packet privileges carried specified obligations for the privileges granted. A definitely stated *quid pro quo*. The specified obligation did not include gratuitous transportation of mail.

6. The Court below is in error when upon the motion for rehearing it attempts to reconcile its decision with its original determination by construing what we believe is the correct translation as follows:

> "According to this translation, Article 2 relates only to Federal, State and Municipal transportation companies; but in paragraph 1 under Article 2 the translation reads:
>
> > The transportation shall likewise be obligatory and gratuitous as regards railroads and companies or enterprises engaged in navigation or highway traffic which enjoy special treatment, benefits or favors from the Union, the States or the Municipalities.
>
> "It is admitted that plaintiff did enjoy special treatment from the Union, and, therefore, presumably it comes within the companies mentioned in paragraph 1 of Article 2."

This is discussed and answered in the brief which follows.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case num-

bered and entitled on its Docket No. 46280, Moore-McCormack Lines, Inc., Plaintiff, *against* The United States, Defendant, and that the judgment of said Court of Claims of the United States be reversed by this Honorable Court in so far as it refused and denied the petitioner's right to recover $32,043.43 for the carriage of Brazilian mail subsequent to June 3, 1941, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated: New York, N. Y., September 17th, 1951.

MOORE-MCCORMACK LINES, INC.,
Petitioner,

By MELVILLE J. FRANCE,
Counsel for Petitioner.